Department of Public Health and Human Services	Section: RESOURCES
MEDICAL ASSISTANCE	Subject: Asset Transfers

Supersedes: MA 404-1 (07/01/06)

►References: 42 U.S.C. §1396p (c)(1)(F) through (I) and 42 U.S.C. 1396p (e); ARM 37.82.101 and .417; P.L. 109-171; P.L. 109-432

GENERAL RULE--An otherwise eligible Medicaid applicant or recipient is restricted from receiving Medicaid coverage of institutionalized or Home and Community Based Service/Waiver (HCBS/waiver) services if a disqualifying transfer of assets has occurred. A disqualifying transfer of assets occurs when:

1. Assets were transferred for less than fair market value,
2. The transfer occurred during the look-back period, or after Medicaid eligibility has been established, and,
3. The transfer was not an exempt transfer described in "Exempt Asset Transfers" below.

In addition to selling and giving away property, disqualifying asset transfers may include, but are not limited to, actions such as:

- Establishing a trust,
- Forgiving a debt without obtaining fair market value,
- Decreasing the extent of ownership interest in an asset,
- Forfeiting or assigning the right to a stream of income,
- Making an unsecured loan,
- Any other action by which an individual gives up or limits his or her rights to or interest in an asset, or in some instances,
- Purchasing an annuity.

►LOOK-BACK PERIOD

From the day an institutionalized or HCBS waiver individual (single or married) requests Medicaid coverage, the look-back period for transfers made from 8/11/1993 through 2/7/2006 is:

1. Thirty-six (36) months; or
2. Sixty (60) months for transfers to trusts;

3. Sixty (60) months for transfers from trusts to or for the benefit of people or entities other than the Medicaid applicant/recipient(s).

   Example: Gladys set up a trust in 1999, for which she and her adult children are the beneficiaries. The trust was set up with her funds. In 2006, Gladys applies for Medicaid. The trust allows for payments to be made from principal for either her (Gladys') benefit, or for her children. In 2002, the trust paid $100,000 as a down payment for a son's home. Even though the trust was set up in 1999, the payment from the trust for the benefit of someone other than Gladys (who is the grantor of the trust) that was made within 60 months of the Medicaid application is treated as an uncompensated asset transfer that will result in a penalty period, unless she submits a successful rebuttal.

► From the date an institutionalized or HCBS/waiver individual (married or single) requests Medicaid coverage, the look-back period for transfers made on or after 2/8/2006 is 60 months for ALL transfers, including payments from trusts to or for the benefit of people or entities other than the Medicaid applicant/recipient(s).

NOTE: Asset transfers for less than fair market value made after application are also subject to penalty.

The look-back date is established based on the first application for Medicaid while an individual is also institutionalized or pursuing waiver, regardless of whether the application is approved or denied (for any reason, including failure to verify information). Only one look-back date is established for each applicant, regardless of multiple periods of institutionalization or multiple applications. Once the look-back date is established, all transfers of assets after that date are subject to evaluation and penalty.

If retroactive coverage is requested, the lookback period is calculated from the first of the retroactive month for which

the Medicaid application is submitted, regardless of in which month the application is submitted (i.e., an application is submitted 10/15/05 and retroactive benefits are requested for July 2005---the lookback period for this application will begin 7/1/02, or 36 months prior to the first month of requested coverage). The penalty period for a transfer made on or after 2/8/06 may begin in the retroactive month if all of the criteria to begin the penalty period are met in the retroactive month. (See MA 404-2.)

ASSETS

Assets include all income and resources the applicant/ recipient and/or his/her spouse:

1. owns;
2. is entitled to receive;
3. is entitled to receive the benefit of (such as being a beneficiary of a trust);
4. would be entitled to receive except for some action or inaction that results in failure to obtain the asset.

NOTE: Those assets that comprise the individual's general resource allowance ($2,000 limit) are **NOT** subject to the asset transfer provisions.

PURCHASE OF AN ANNUITY

The purchase of an annuity by either an applicant/recipient or by a community spouse may be considered to be an uncompensated transfer of assets in certain circumstances.

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An annuity purchased or converted on or after February 8, 2006 by a Medicaid applicant or recipient or community spouse will be considered an uncompensated asset transfer (subject to rebuttal) when determining eligibility for nursing home or HCBS waiver services unless:

1. The annuity payments are made to the Medicaid applicant/recipient or community spouse;
2. The periodic scheduled payments are required to be paid on at least an annual basis;
3. The annuity requires equal payments throughout the contract (e.g., no deferred or balloon payments at any point during the payment period);
4. The payment schedule is actuarially sound (the equal period payments are based on expectation of a full payout of the contract within the annuitant's life expectancy);
5. The annuity is irrevocable;
6. The annuity is non-assignable; AND

7. The State of Montana Medicaid Program is named as the irrevocable first position residual beneficiary of the annuity.

► This assignment of irrevocable residual beneficiary requirement applies to any annuity that is purchased or converted (see Annuities, MA 402-1) on or after 2/8/2006.

► An annuity is converted if the annuity contract is changed. Examples of conversion include, but are not limited to, actions such as annuitizing a previously un-annuitized annuity or changing an annuity from one type of annuity to another. Automatic events such as the start of pre-arranged payments or other actions taken by the annuity company that are not voluntary on the part of the annuity owner are not considered conversions.

The Medicaid applicant/recipient may name a community spouse, a minor child, or a blind/disabled adult child as the primary beneficiary before the State of Montana Medicaid Program. The community spouse can name only a minor child or blind/disabled adult child as the primary beneficiary before the State of Montana Medicaid Program. However, if such an individual is named as a beneficiary in a position primary to the State of Montana Medicaid Program, the State of Montana Medicaid Program must be named as the first position beneficiary if the spouse or child disposes of any remainder for less than fair market value. In other words, the State of Montana Medicaid Program becomes entitled to the remaining balance of the annuity if the spouse or child attempts to liquidate or transfer their remainder interest in the annuity for less than fair market value.

► An individual retirement annuity [subsection (b) of section 408 of the IRS Code of 1986], a qualified employer plan annuity [subsection (q) of section 408 of the IRS Code of 1986], or purchase of an annuity with an IRA, employer or employee association account, or a qualified salary reduction arrangement [section 408(a), (c), or (p) of the IRS Code of 1986] or a simplified employee pension [within the meaning of section 408(k) of the IRS code if 1986] will not be considered an uncompensated asset transfer (provided the payments are made to the owner of the above-named account or arrangement) or require beneficiary assignment to the State of Montana Medicaid Program. If an individual

alleges one of these situations, gather documentation and request assistance from the regional policy specialist in determining whether the criteria are met.

An annuity purchased by a Medicaid recipient or community spouse after eligibility has been determined must report the purchase of the annuity under normal change reporting requirements, and must amend the annuity to meet the above requirements in order to continue to meet Medicaid eligibility requirements. If a community spouse refuses to amend his/her annuity to make the State of Montana Medicaid Program the primary remainder beneficiary, the purchase of the annuity will be considered an uncompensated asset transfer and will result in a penalty being applied to the nursing home spouse, regardless of any other provisions excepting penalties for asset transfers made by the community spouses after Medicaid has been established by the nursing home spouse.

TREATMENT OF JOINTLY OWNED ASSETS

When an asset is held in sole ownership, in common with another via joint tenancy, tenancy in common, joint ownership, or a similar arrangement, the asset (or portion of the asset) is considered to be transferred when any action is taken that reduces the individual's ownership or control of the asset.

Example 1: A daughter's name is included on Jim's checking account. The account still belongs to Jim. If the daughter withdraws funds for any purpose other than to provide for Jim, she has removed the funds from Jim's control. Thus, there is an asset transfer.

Example 2: A daughter's name is placed on Tom's home title, which limits Tom's right to sell or otherwise dispose of the home. Because the addition of daughter's name on the title requires daughter's agreement to the home sale or disposal where no agreement was necessary before, adding daughter's name to the title constitutes an asset transfer.

Example 3: During the 90-day period during which assets allocated to the community spouse are to be transferred from the nursing home spouse to the community spouse, the community spouse

removes the nursing home spouse's name from their home and from a joint CD. In place of the nursing home spouse's name, the community spouse adds his daughter's name. The substitutions of the daughter's name for the nursing home spouse's name on the deed to the home and on the bank's CD records are uncompensated asset transfers. The community spouse must simply remove the nursing home spouse's name so the community spouse has full ownership. Substituting another's name is a transfer of the nursing home spouse's assets to a third party.

WHO TRANSFERRED ASSET

An asset transfer by the applicant/recipient and/or his/her spouse must be evaluated as if the applicant/recipient made the transfer. Additionally, assets will be considered transferred by the applicant/recipient or his/her spouse when they are transferred by:

1. A parent;
2. A guardian;
3. A court; or
4. Anyone acting on behalf of, or at the direction of, the applicant/recipient or his/her spouse (e.g., an attorney).

NOTE: Assets refused by the applicant/recipient, spouse, etc. are considered to be transferred assets. For example, waiving pension income, waiving the right to inherit, not accepting or accessing an injury settlement, or a surviving spouse's failure to seek his/her elective share of a deceased spouse's estate (see MA 906-1)

EXEMPT ASSET TRANSFERS

Do <u>not</u> evaluate asset transfers when:

1. The asset was transferred to a spouse prior to establishment of nursing home or waiver eligibility under spousal impoverishment policies.

► 2. The asset was transferred from the institutionalized or HCBS/waiver spouse to a community spouse during the 90-day transfer period after approval of institutional or HCBS/waiver coverage and was part of

the Community Spouse Resource Maintenance Allowance.

3. The asset was transferred to a minor or adult child who is blind or disabled according to Social Security criteria.

4. The asset transferred is the applicant/recipient's home and title to the home is transferred to:

   a. The spouse;

   b. A child under age twenty-one (21);

   c. An adult child who has been determined to be blind or permanently disabled according to Social Security criteria;

   d. A child (regardless of age) who:

► (i) Resided with the applicant/recipient for two years immediately prior to the applicant/ recipient's nursing home admission; and

► (ii) Provided care which permitted the applicant/recipient to reside at home (a doctors statement must confirm the care provided deferred nursing home admission); or

   e. A sibling who:

      (i) Has equity interest in the home; and

      (ii) Continually resided in the home for at least one (1) year prior to the applicant/recipient's nursing home admission.

► 5. The asset was transferred exclusively for a purpose other than qualifying for medical assistance, such as satisfaction of legally enforceable debts.

The timing of payments of “debts” should be considered. For example, if a family member

suddenly remembers or decides to collect on an alleged debt that has purportedly been outstanding for years, and no convincing evidence exists that either the applicant/recipient affirmatively acknowledged the debt or attempted to work toward satisfying the debt and that the individual(s) to whom the alleged debt was owed made previous efforts to collect the debt, the validity of the debt and whether it is legally enforceable may be questionable.

► **NOTE:** Estate planning is a process designed to help manage and preserve a person's assets while alive and to conserve and control their distribution after death. For purposes of the determination of Medicaid eligibility, "estate planning" actions must be considered as specifically for preserving assets from long term care costs through achieving Medicaid eligibility.

6. The asset(s) was transferred into the individual's Special Needs Trust (see MA 402-3).

7. The asset was transferred by the community spouse, was an asset allowed to the community spouse as part of the Community Spouse Resource Maintenance Allowance, and was transferred AFTER Medicaid was approved and opened for the institutionalized spouse. (If assets are transferred by community spouse via a will and the community spouse predeceases the institutionalized spouse, see MA 906-1). Or,

   NOTE: Transfers of any assets that are made by the community spouse prior to spousal impoverishment policies being applied to the couple will be evaluated for uncompensated transfer against the spouse who is the Medicaid applicant/recipient.

8. Denial of coverage or eligibility would cause an undue hardship. An undue hardship exists only when:

   (a) The asset was transferred as a result of fraud, misrepresentation or coercion perpetrated

against the applicant/recipient and/or his/her spouse; and

(b) The applicant and/or his/her spouse have exhausted all legal recourse to recover the transferred resource. Exhausting all legal recourse includes, but is not necessarily limited to, filing a civil court action and pursuing the civil action to its conclusion. The requirement to exhaust all legal recourse is not satisfied by the filing of criminal charges against the person who received the assets by means of fraud, misrepresentation or coercion.

DETERMINING UNCOMPENSATED VALUE

An asset is transferred for less than fair market value if the compensation received by the individual is less than the fair market value of the asset on the date of transfer or contract for sale (if earlier). Fair market value means the price of the asset on the open market.

Compensation means money, real or personal property, food, shelter or services:

1. Received by the applicant/recipient or spouse at or after the time of transfer in exchange for the resource IF the compensation was provided under a legally enforceable agreement in effect at the time of the transfer, OR

2. Received prior to the transfer if they were provided under a legally enforceable agreement whereby the applicant/recipient agreed to transfer the asset or otherwise pay for such items.

Compensation also includes payment or assumption of a legal debt owed by the applicant/recipient in exchange for the asset.

► Compensation does not include services or gifts previously provided to the applicant/recipient out of love or concern without expectation and promise of payment.

The value of compensation in the form of a promise of future services, food, or shelter is based on fair market value for the length of time the applicant/recipient can reasonably be expected to receive such support or maintenance from the

date of the transfer or contract, whichever is earlier (see MA 008, "Life Expectancy Table").

► Services provided through a personal care contract cannot duplicate services that are being provided or are available as part of another existing contract, or encompassed by the package of services provided by a nursing home, assisted living facility, or adult foster home in which the individual is residing. For example, since a nursing home provides dietary services, including assistance in eating when necessary, a separate service contract for payment to another party for that party to provide assistance in eating is not considered a valid expense in a personal care contract. Contracts and payments for duplicative services are considered uncompensated asset transfers.

Example 1: At 80 years of age, Betty transferred her home, which she still lived in, to Wilma, a licensed practical nurse. In exchange for the home, Wilma agreed to provide daily nursing and homemaker services. At the time of transfer, the home's market value was $50,000. Betty is expected to live another 9.09 years (see MA 008, "Life Expectancy Table"). The services' current market value is $20,000 per year X 9.09 years = $181,800. Betty can be expected to receive more than fair market value in exchange for her home.

Example 2: As Jane's health declines, her daughters provide her with services such as grocery shopping, housekeeping and transportation, and take care of her often when she is unwell, but none of them live with her. The services and care continue, without any promise of payment or compensation, for three years. Prior to Medicaid application, Jane transfers her certificates of deposit to the daughters. The reason given at application is for payment for the care her children provided to her over the past several years. Because the care was provided without promise of payment, the care that Jane's daughters provided to her over the past three years cannot be considered to be compensation for the value of the CDs.

► Example 3: Fred, a nursing home resident, enters into a personal care contract with his two sons. The personal care contract states that the sons are being compensated for coming to visit Fred and monitor his care and condition, for coming to the facility to assist him in eating two meals per day, for doing his laundry weekly, and for assisting him with management of his finances. Each son will be paid $2000 per month for these services. Since the nursing home provides both assistance in eating and laundry as part of their service package, these services are duplicative and payment to the sons for these services is treated as uncompensated transfers. Since both sons live within a mile of the facility (and are thus not incurring high travel expenses in fulfilling the contract) and neither is furnishing professional CPA or social work services, $2000 per month each exceeds reasonable standards of reimbursement for services from laymen. A reasonable amount for the financial services and visitation (including documentation of the frequency of such visits not related to feeding assistance) must be established based on the number of hours they are reasonably spending on performing these activities and a reasonable hourly payment for purposes of determining the amount that will be recognized as compensation.

The uncompensated value of transferred property is the fair market value of the property, less any compensation received according to the policy outlined above.

The fair market value of a stream of income is considered to be the amount of the annual payments multiplied by the life expectancy of the person upon whose lifetime the payments are based.

Example: Guido is entitled to payments of $300 per month for the remainder of his life from an annuity. Guido is 85 years old. The value of this "stream of income" is $300/month X 12 months X 5.27 (Guido's life expectancy per MA 008), or $18,972.

NOTIFICATION

The applicant must be advised of any disqualifying transfer penalty determination **before eligibility is approved or denied**. The advising notice must:

1. Inform the individual that an uncompensated transfer has been identified;

2. Give the value of the resource transferred; and

3. Explain the applicant/recipient's right to rebut the presumption that the transfer was made to qualify for assistance.

If the applicant/recipient does not respond to the notification within fifteen days, the eligibility case manager must assume that no rebuttal will be received, and proceed with establishing and applying the asset transfer penalty.

TRANSFER REBUTTAL STATEMENT

The applicant/recipient may rebut the presumption that a resource was transferred for the purpose of establishing eligibility for Medicaid. In that case, it is the applicant/ recipient's responsibility to present convincing evidence that the asset was transferred exclusively for some other reason. The rebuttal statement must include and be accompanied by:

1. The reason(s) the asset was transferred;

2. Documentation of attempts to sell the asset at fair market value;

3. Documentation that fair market value was received or the reason for accepting less than fair market value;

4. Documentation of means of self-support after the transfer; and

5. Statement of relationship to the person to whom the asset was transferred.

CONVINCING EVIDENCE

Factors that may indicate a transfer was not made to qualify for assistance include:

1. The occurrence of one of the following after the asset has been transferred:

a. Traumatic onset of disability;
b. Diagnosis of a previously undetected disabling condition;
c. Unexpected loss of other resources which would have precluded eligibility for medical assistance; or
d. Unexpected loss of income that would have precluded eligibility for medical assistance.

2. Total countable assets (including the uncompensated value of the transferred asset) fall below the general resource limit during each of the months comprising the appropriate lookback period;

3. The transfer was court-ordered in a contested court action; or

4. The asset was transferred as a result of fraud, misrepresentation or coercion perpetrated against the applicant and/or the applicant's spouse, and the applicant and/or the applicant's spouse have exhausted all legal recourse to recover the transferred resource. Exhausting all legal recourse includes, but is not necessarily limited to, filing a civil court action and pursuing the civil action to its conclusion. The requirement to exhaust all legal recourse is not satisfied by the filing of criminal charges against the person who received the assets by means of fraud, misrepresentation or coercion.

NOTE: The transferred property is considered inaccessible as long as the civil suit has been filed with a court of competent jurisdiction and is pending but is being actively pursued.

PROCEDURE: **EVALUATING ASSET TRANSFER REBUTTALS**

Responsibility	**Action**
►Eligibility Case Manager	1. Upon identifying a potentially uncompensated asset transfer or transfers, send the applicant/recipient a notice advising them of the potentially disqualifying asset transfer, the value of the resource transferred, and explaining the right to rebut the transfer within 15

days of the notice.

Applicant/Recipient/ Representative	2.	Provide the county office with a rebuttal statement regarding transferred asset(s).
Eligibility Case Manager	3.	Evaluate the rebuttal statement and documentation.
	4.	Recommend accepting or rejecting the rebuttal statement to the county director.
		NOTE: A recommendation to accept the rebuttal must be based on evidence that the transfer was exclusively for some purpose other than to establish Medicaid eligibility.
County Director	5.	Review the eligibility case manager's recommendation.
	6.	Accept or reject the rebuttal statement; case note decision. Assistance can be requested from the Regional Policy Specialist.
Eligibility Case Manager	7.	When the rebuttal statement is: a. **Accepted,** the transfer will be considered exempt; or b. **Rejected,** a penalty period must be imposed (see MA 404-2).
►		**NOTE:** A rebuttal may be partially accepted and partially rejected, in that the rebuttal may contain information that would reduce the ineligibility period without completely exempting it.
	8.	Notify applicant of determination via system notice.

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